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State v. Richmond Respondent's Brief Dckt. 44690

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44690
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2012-4376
)	
ROBERT ARTHUR RICHMOND,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Richmond failed to establish that the district court erred by denying his Rule 35 motion for correction of an illegal sentence?

Richmond Has Failed To Establish That The District Court Erred In Denying His Rule 35 Motion For Correction Of An Illegal Sentence

A jury found Richmond guilty of aggravated assault, and Richmond admitted he was a persistent violator. (41093 R., pp.71-72, 108, 137.) The district court imposed a unified sentence of nine years, with two years fixed, and retained jurisdiction. (41093 R., pp.137-41.) Four years later, Richmond filed a Rule 35 motion for correction of an

illegal sentence, arguing the persistent violator enhancement to which he pled guilty no longer applied because the felony convictions upon which it was predicated had since been reduced to misdemeanors. (44690 R., pp.13-16.) The district court denied the motion, and Richmond timely appealed. (44690 R., pp.59-63, 66-68.)

Mindful of case law that refutes his claim, Richmond nevertheless challenges the denial of his Rule 35 motion, arguing as he did below that his sentence is illegal because the felony convictions upon which his persistent violator enhancement was based were later reduced to misdemeanors. (Appellant's brief, pp.3-4.) Richmond has failed to show error in the denial of his Rule 35 motion for correction of an illegal sentence.

Pursuant to Idaho Criminal Rule 35, a district court may correct a sentence that is "illegal from the face of the record at any time." In State v. Clements, 148 Idaho 82, 87, 218 P.3d 1143, 1148 (2009), the Idaho Supreme Court held that "the interpretation of 'illegal sentence' under Rule 35 is limited to sentences that are illegal from the face of the record, i.e., those sentences that do not involve significant questions of fact nor an evidentiary hearing to determine their illegality." An illegal sentence under Rule 35 is one in excess of a statutory provision or otherwise contrary to applicable law. State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003).

Richmond's assertion that the persistent violator enhancement should no longer apply to his sentence because his prior felony convictions have been reduced to misdemeanors is not the proper subject of a Rule 35 motion. As explained by the district court in its order denying Richmond's Rule 35 motion:

Here, the challenge is not that the sentence was excessive or there was lack of proper credit for time served. Rather, the challenge is that the

sentencing enhancement applied in this case should not have been applied. The factual basis for this assertion, that the Defendant no longer has prior felony convictions, is external to the record in this case. As of the date of sentencing, the defendant in fact had the prior felonies and admitted to the same at trial. Because the asserted basis for the illegality of the sentence does not appear on the face of the record, that basis cannot serve to set aside the sentence.

There must be some finality to judgments. Here it is unquestioned that [the] Defendant had two prior felony convictions at the time he was sentenced. He is now seeking to collaterally attack those sentences on the basis of subsequent changes in the law in California. These changes do not alter the facts as they existed at the time of sentencing. Where there is no showing the defendant's constitutional rights are implicated, a judgment and sentence based on the persistent violator statute is not subject to collateral attack following a guilty plea. *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969)

(44690 R., pp.60-61.) Richmond has failed to show that his sentence was illegal from the face of the record and, as such, has not shown any basis for reversal of the district court's order denying his Rule 35 motion for correction of an illegal sentence.

Conclusion

The state respectfully requests this Court to affirm the district court's order denying Richmond's Rule 35 motion for correction of an illegal sentence.

DATED this 2nd day of August, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 2nd day of August, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General